

Serial No. 10/808,156

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Don Wiley SMITH et al.	Docket No.: 22601-P002C1 RPB REF: MARTIN-0002
Serial Number: 10/808,156	Art Unit: 3642
Filing Date: March 24, 2004	Examiner: Jeffery L. Gellner
Title: METHODS AND MIXTURES FOR TREATING DISTRESSED TREES	

AFFIDAVIT UNDER 37 C.F.R. 1.131

Honorable Commissioner of
Patents and Trademarks
Washington, D.C. 20231

Sir:

This is an Affidavit submitted under 37 CFR 1.131 swearing behind a reference. Applicant respectfully requests that the Examiner carefully consider the following information.

37 CFR 1.131 states:

37 CFR 1.131 Affidavit or declaration of prior invention to overcome cited patent or publication

(a)(1) When any claim of an application or a patent under reexamination is rejected under 35 U.S.C. 102(a) or (e), or 35 U.S.C. 103 based on a U.S. patent to another or others which is prior art under 35 U.S.C. 102(a) or (e) and which substantially shows or describes but does not claim the same patentable invention, as defined in Section 1.601(n), or on reference to a foreign patent or to a printed publication, the inventor of the subject matter of the rejected claim, the owner of the patent under reexamination, or the party qualified under Section Section 1.42, 1.43, or 1.47, may submit an appropriate

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PATENT

oath or declaration to overcome the patent or publication. The oath or declaration must include facts showing a completion of the invention in this country or in a NAFTA or WTO member country before the filing date of the application on which the U.S. patent issued, or before the date of the foreign patent, or before the date of the printed publication. When an appropriate oath or declaration is made, the patent or publication cited shall not bar the grant of a patent to the inventor or the confirmation of the patentability of the claims of the patent, unless the date of such patent or printed publication is more than one year prior to the date on which the inventor's or patent owner's application was filed in this country.

- (2) A date of completion of the invention may not be established under this section before December 8, 1993, in a NAFTA country, or before January 1, 1996 in a WTO member country other than a NAFTA country.
- (b) The showing of facts shall be such, in character and weight, as to establish reduction to practice prior to the effective date of the reference, or conception of the invention prior to the effective date of the reference coupled with due diligence from prior to said date to a subsequent reduction to practice or to the filing of the application. Original exhibits of drawings or records, or photocopies thereof, must accompany and form part of the affidavit or declaration or their absence satisfactorily explained.(emphasis added)

As claims in the present invention have been rejected under 35 USC '103 as being obvious in view of Prior Art, an Affidavit under 37 C.F.R. '1.131 is permissible.

Our invention predates the effective date of the GARRETT reference ("The time is not ripe to start sweet potatoes", The Dallas Morning News, November 26, 1999) applied by the Examiner in the Office Action of October 1, 2004, in the above-captioned Application.

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In fact, at about the time of the GARRETT reference, the inventors had discussed the subject of our present invention with others in Texas, as relating to Post Oak trees. The "arborist" that "D.G" or North Arlington may in fact have been one of the inventors in the present application.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine, or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.

Respectfully submitted,

Don W. Smith
Print Name

Don W. Smith
Inventor Signature

Feb. 1, 05
Date

Submitted by Applicant's Attorney:

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February 1, 2005

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Respectfully submitted,

Print Name

Inventor Signature

Date

Submitted by Applicant's Attorney:

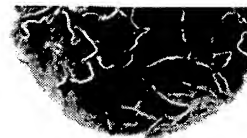
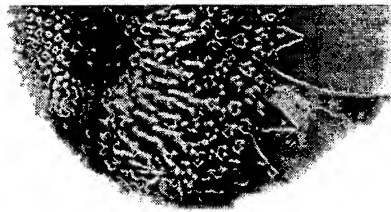
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Topic

Sick Tree Treatment

SICK TREE TREATMENT FOR OAK WILT & OTHER TREE PROBLEMS

January 2005

Texas A&M and the Texas Forest Service recommend a program of trenching to separate the roots of sick trees from those of healthy trees, cutting down sick and nearby healthy trees and injecting a toxic chemical fungicide called Alamo directly into the trunks or root flares of the trees. I don't recommend this program because it does nothing to address the cause of the disease. Trees succumb to insect pests and diseases because they are in stress and sick. Mother Nature then sends in the clean up crews. The insects and pathogens are just doing their job – trying to take out the unfit plants. Most sickness is environmental – too much water, not enough water, too much fertilizer, wrong kind of fertilizer, toxic chemical pesticides, compaction of soil, grade changes, ill-adapted plant varieties and/or over planting single plant species and creating monocultures, such as American elms in the Northwest and red oak/live oak communities in certain parts of Texas.

My plan is simple. Keep trees in a healthy condition so their immune systems can resist insect pests and diseases. It has been noticed by many farmers and ranchers that oak wilt doesn't bother some trees – especially those that are mulched and those where the natural habitat under trees has been maintained. The process called the Sick Tree Treatment has given excellent results. It is as follows:

Step 1: Remove Excess Soil from Above Root Ball

A very high percentage of trees have been planted too low. Soil on top of the root ball smothers the tree and leads to circling and girdling roots. Soil, or even heavy mulch, on trunks keeps the bark constantly moist which can rot or girdle the tree. Many new trees are too low in their containers.

Step 2: Aerate the root zone heavily

Don't rip or plow the soil, but punch holes heavily throughout the root zone. Start between the drip line and the trunk and go far out beyond the drip line. A 7-12" depth of the aeration holes is ideal but any depth is beneficial. An alternative is to spray the root zone with a living organism product or bio-stimulant.

Step 3: Apply Organic Amendments

At about 40-80 lbs./ 1,000 sq. ft., lava sand at about 40-80 lbs./1,000 sq. ft., horticultural cornmeal at about 10-20 lbs./1,000 sq. ft. and sugar or dry molasses at about 5 – 10 lbs./ 1,000 sq. ft. Cornmeal is a natural disease fighter and molasses is a carbohydrate source to

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feed the microbes in the soil. Apply a 1" layer of compost followed by a 3-5" layer of shredded native tree trimmings. Native cedar is the best source for mulch. In turf use a 1" layer of horticultural cedar flakes.

Step 4: Spray Foliage and Soil

Do this monthly or more often if possible with Garrett Juice. For large-scale farms and ranches, a one-time spraying is beneficial if the budget doesn't allow ongoing sprays. Adding garlic tea to the spray is also beneficial while the tree is in trouble.

Step 5: Stop Using High Nitrogen Fertilizers and Toxic Chemical Pesticides

Pesticides kill the beneficial nematodes and insects. Synthetic fertilizers are destructive to the chemistry, the structure and the life in the soil.

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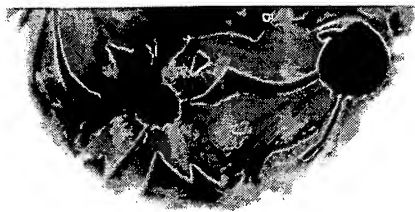
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Topic

Post Oak

COMMON NAMES: POST OAK, IRON OAK, CROSS OAK

Quercus stellata (KWER-kus sta-LOT-ah)

Fagaceae (Beech Family)

Deciduous shade tree

HEIGHT: 30 to 80 feet

SPREAD: 20 to 20 feet

FINAL SPACING: 20 to 40 feet

NATURAL HABITAT AND PREFERRED SITE: Post oak occurs in all areas of Texas except the High Plains and the Trans-Pecos. It grows in sandy loam soils that are neutral to acid but can also grow in acidic and neutral clay soils. It does not grow in the black and white alkaline or calcareous soils.

IDENTIFICATION INFORMATION: It is a rounded tree with stout, interestingly branched limbs with gnarly growth and rounded lobed leaves. Fall color is less than spectacular – yellow to brown.

FLOWERS AND FRUIT: Flowers appear with the leaves in March through May, male and female catkins on the same tree. Fruit ripens in the fall September through October, small acorns mature in the first season.

BARK: Gray brown, fairly thick and heavy textured even when young and developing into a medium to dark color with age.

FOLIAGE: Leaves are simple, alternate and deciduous. Yellow, unspectacular fall color. Leaves are 4 to 7 inches long, 3 to 5 inches wide with rounded lobes. Side lobes of the leaves are almost perpendicular to the midvein creating a cross-like effect.

CULTURE: Slow growing native oak that hates human activities. Very difficult to transplant. Fairly difficult to grow from seed and is hard to work around without damaging. Post oak needs extremely well-drained soil and neutral to acid soil conditioning. It does not like much fertilizer and needs adequate soil moisture. It is fairly drought tolerant but has been damaged in some of the extreme drought years. Compaction, construction, application of herbicides and synthetic fertilizers have killed many thousands of post oaks and other native oaks in Texas.

PROBLEMS: Wet feet, human impact and secondary attack by insect pest and diseases. The cure is leaving the trees in their native

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state as much as possible and applying the Sick Tree Treatment to those trees in stress.

PROPAGATION: From acorns planted as soon as they fall from the tree or stored cool and moist at 32-36 degrees prior to planting the following spring.

INSIGHT: This is the most common native oak in North Texas. Many thousands of these trees die every year from damage during construction of new developments because contractors scrape away the top soil and the native understory, compact the soil and change the environment of the feeder roots. To keep post oak alive water moderately, do not fertilizer at all or very little, do not thin out, do not change the soil grade and do not remove the native understory growth. Other post oaks are as follows – *Quercus margaretta* sand post oak, *Quercus drummondii* drummond post oak, *Quercus boyntonii* is the boynton post oak which grows near Lufkin and is a spreading dwarf oak.

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